STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 7, 2000
v	No. 207773 Oakland Circuit Court
DAMON R. HORNER, Defendant-Appellant.	LC No. 97-151911-FC

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, unlawfully driving away a motor vehicle ("UDAA"), MCL 750.413; MSA 28.645, possession of a controlled substance, second offense, MCL 333.7413(2); MSA 14.15(7413)(2), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and failure to obey a police officer's signal, MCL 750.479a; MSA 28.747(1). Defendant was sentenced to serve 5 ½to 10 years' imprisonment for the assault conviction, three to five years' imprisonment for the UDAA conviction, one to two years' imprisonment for the possession of marijuana conviction, and one year of imprisonment for the failure to obey a police officer's signal conviction. These sentences were ordered to be served concurrently, consecutive to a two-year term for the felony-firearm conviction. All sentences were also ordered to run consecutively to a parole violation sentence. Defendant now appeals as of right. We affirm.

Defendant was originally charged with assault with intent to commit murder, MCL 750.83; MSA 28.278. In related claims, defendant first argues that the trial court erred in instructing the jury on the cognate lesser included offense of assault with intent to do great bodily harm less than murder because insufficient evidence was presented to support such a charge. Defendant claims that the evidence supported only a finding that he intended to kill the pursuing police officer, not that he intended to wound him. We disagree.

We initially note that defendant did not object to the jury instructions, and thus has failed to preserve this portion of his claim. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). However, to the extent defendant's challenge rests on the alleged insufficiency of the evidence,

we consider these claims because no particular action is required to preserve that issue for appellate review. *People v Patterson,* 428 Mich 502, 514; 410 NW2d 733 (1987).

When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *People v Hutner,* 209 Mich App 280, 282; 530 NW2d 174 (1995). In addition, the trial court is required to give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same category, and (2) the evidence adduced at trial would support conviction of the lesser offense. *People v Hendricks,* 446 Mich 435, 444; 521 NW2d 546 (1994). Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Parcha,* 227 Mich App 236, 239; 575 NW2d 316 (1997); *People v Harrington,* 194 Mich App 424, 428; 487 NW2d 479 (1992). Assault with intent to do great bodily harm is a specific intent crime. *People v Bailey,* 451 Mich 657, 668-669; 549 NW2d 325 (1996). Questions of intent are ordinarily for the jury to determine. *People v Martin,* 392 Mich 553, 560-562; 221 NW2d 336 (1974).

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime of assault with intent to do great bodily harm proven beyond a reasonable doubt. Defendant attempted to do corporal harm to a police officer when, at the conclusion of a vehicular pursuit, he shot at the officer twice, at close range, with a loaded handgun. *Parcha, supra* at 239. The intent to harm the officer can be inferred from that same conduct. *Id.* While such action may in fact have been sufficient to establish an intent to commit murder, the possibility that this more deadly intent could have been found does not render the same evidence insufficient to establish the intent to do great bodily harm. See *Harrington, supra* at 429-430. We find no error in the trial court's instruction on the lesser included offense, and we conclude that the evidence supports defendant's conviction.

Defendant next argues that the trial court abused its discretion in denying his request to change from jail-issued shoes into his own dress shoes. We disagree. A defendant is entitled to be brought before the court in proper attire. See *People v Shaw,* 381 Mich 467, 474; 164 NW2d 7 (1969). A defendant is thus entitled to wear civilian clothing rather than prison clothes. *People v Lewis,* 160 Mich App 20, 30; 408 NW2d 94 (1987). Generally, therefore, if a defendant timely requests to be allowed to wear civilian clothes, his request must be granted. *People v Harris,* 201 Mich App 147, 151; 505 NW2d 889 (1993). A defendant can be denied due process of law by being compelled to go to trial wearing prison clothes. *People v Lee,* 133 Mich App 299, 300; 349 NW2d 164 (1984). A defendant is not, however, deprived of due process by the casualness of his civilian attire or by wearing jail garb that appears to be civilian clothing. *Harris, supra* at 151-152. Only if defendant's clothing can be said to impair the presumption of innocence is there a denial of due process. *Lewis, supra* at 31. To justify reversal of a conviction on the basis of being improperly attired, the defendant must show that prejudice resulted. See *People v Robinson,* 172 Mich App 650, 654; 432 NW2d 390 (1988).

Here, the only time defendant was attired in jail garb before the jury was when he wore jail-issued shoes during the jury selection process. There is no indication in the record that the unmarked, brown plastic jail shoes were obviously jail attire or that they were distinctive in any way. Under the circumstances, wearing these shoes during the jury selection process did not impair defendant's presumption of innocence or otherwise deprive him of a fair trial. *Lewis, supra* at 31. Moreover, defendant has failed to show how he was prejudiced by wearing these shoes at this stage of the process. *Robinson, supra* at 654. In sum, we hold that the trial court did not abuse its discretion in denying defendant's request, made immediately before jury selection began, to change into dress shoes. *Harris, supra* at 151.

Next, defendant claims that defense counsel provided ineffective assistance by failing to subpoena alibi witnesses. We again disagree. Defendant failed to advance this claim before the trial court. Such failure forecloses appellate review unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to mistakes apparent on the existing record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). This Court reviews the existing record to determine if defendant has shown that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must overcome the strong presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Moreover, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The decision whether to present particular witnesses is a matter of trial strategy that may constitute ineffective assistance only where a failure to present the witness deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

The record is devoid of any indication that defendant had an alibi for the time of the offense. Moreover, defendant has not identified the alleged alibi witnesses or provided any indication as to what their testimony would have been. Having failed to show that defense counsel's failure to call these alleged witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding, defendant has failed to demonstrate prejudice and has failed to overcome the presumption that counsel's decision not to call any such witnesses was sound trial strategy. *Id.*; *Johnson, supra* at 124.

Defendant also claims that his absence during an in-court discussion of certain matters violated his constitutional right to be present because the discussion included a recitation of the witnesses defense counsel planned to call at trial. Defendant contends that if he would have been present during the

proceedings, he would have learned that defense counsel did not plan to call any alibi witnesses. This contention is without merit.

Although this issue was not raised below, a constitutional claim may be reviewed absent an objection to determine whether the alleged error was decisive to the outcome of the case. *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998). A criminal defendant has a statutory right to be present at his trial. MCL 768.3; MSA 28.1026; *People v Woods*, 172 Mich App 476, 478-479; 432 NW2d 736 (1988). An accused's right to be present at trial is also impliedly guaranteed by the federal and state constitutions and grounded in common law. *People v Mallory*, 421 Mich 229, 246, n 10; 365 NW2d 673 (1984). In *People v Bowman*, 36 Mich App 502, 510; 194 NW2d 36 (1971), this Court set forth the law applicable to defendant's claim:

> Generally, defendant's right to be present at his trial extends to all conferences or occurrences at the trial wherein or whereby his substantial rights may be affected. *Hopt v Utah* (1884), 110 US 574 (4 S Ct 202, 28 L Ed 262). Nothing in the nature of evidence should be taken in the absence of the accused. *People v Medcoff* (1955), 344 Mich 108. However, this is a right which may be waived, *People v Gant* (1961), 363 Mich 407, and in some circumstances the error of proceeding without the defendant's presence may be harmless error. *United States v Schor* (CA2, 1969), 418 F2d 26; *People v Kregger* (1953), 335 Mich 457. Often courts distinguish defendant's right to be present when substantive matters are discussed from defendant's discretionary presence when matters of procedure of law are discussed.

The proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction is whether there is any reasonable possibility of prejudice. *People v Morgan*, 400 Mich 527, 535-536; 255 NW2d 603 (1977), cert den sub nom *Cargile v Michigan*, 434 US 967; 98 S Ct 511; 54 L Ed 2d 454 (1977); *People v Kvam*, 160 Mich App 189, 197; 408 NW2d 71 (1987).

The proceedings in question occurred immediately before jury selection began. At that time, the prosecutor and defense counsel were merely discussing preliminary matters; specifically, what witnesses the prosecution, not the defense, would be presenting. Nothing in the nature of evidence was presented, and defense counsel never outlined his case, commented on the defense that would be presented, or indicated what witnesses he would call in his case-in-chief. Defendant's claim that his absence from the courtroom prevented him from hearing the witnesses defense counsel intended to present accordingly fails on its premise. We find that there is no reasonable possibility that defendant was prejudiced by his absence fom the courtroom during this discussion of preliminary procedural matters. *Morgan, supra* at 535-536.

Next, defendant claims that he was denied due process and a fair trial because of the cumulative effect of several alleged errors. We disagree. Defendant is entitled to a fair trial, not a perfect one. *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998). The cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, where this Court finds no error on any single issue, there can be no

cumulative effect *Id.* Because defendant has failed to show any errors on appeal, there could not have been a cumulation of errors depriving him of a fair trial.

Lastly, defendant claims that the trial court's comments when determining his sentence for assault with intent to do great bodily harm less than murder demonstrate an abuse of discretion. Defendant contends that the trial court improperly focused on his refusal to admit guilt. We disagree.

A trial court cannot base its sentence, in whole or in part, on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). However, a lack of remorse can be considered in determining a defendant's potential for rehabilitation. See *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). The distinction between a sentence based on a refusal to admit guilt and a sentence based on the resultant reduction in the potential for rehabilitation is subtle. *People v Badour*, 167 Mich App 186, 199; 421 NW2d 624 (1988), rev'd on other grds 434 Mich 691 (1990). As stated in *Wesley*, *supra* at 713:

> While this Court has never specifically addressed the issue, in determining whether sentencing was improperly influenced by defendant's failure to admit guilt, the Court of Appeals has focused upon three factors: (1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. Under the Court of Appeals analysis, if there is an indication of the three factors, then the sentence was likely to have been improperly influenced by the defendant's persistence in his innocence. If, however, the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal. [Citations omitted.]

We first note that defendant did not admit his guilt at the sentencing hearing. Assuming, however, that the trial court's comments in question constituted an attempt by the trial judge to get defendant to admit guilt, there is no indication that the trial judge imposed a harsher sentence because defendant would not admit guilt. *Id*. Moreover, defendant's sentence was within the guidelines' recommended range and is presumed to be neither excessive nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). We find no abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen